

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10464-JMD
Chapter 13

Kelly F. Dodson,
Debtor

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MEMORANDUM OPINION

I. INTRODUCTION

The Debtor has filed a motion to reconsider (the “Motion”) (Doc. No. 57) an order granting Midfirst Bank (the “Bank”) relief from the automatic stay (the “Order”) (Doc. No. 54) pursuant to an Affidavit of Non-Compliance filed by the Bank (the “Affidavit”) (Doc. No. 53) and the provisions of Local Bankruptcy Rule 9071-1.¹

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

¹ The Local Bankruptcy Rules shall be referred to in this opinion as “LBR.”

II. FACTS

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code² on February 24, 2000. On September 7, 2000, the Debtor and the Bank entered into a stipulation, which resolved a stay relief motion filed by the Bank (the “Stipulation”) (Doc. No. 18). On September 11, 2000, the Court approved the Stipulation. The Stipulation provided that if the Debtor defaulted in making any payments under the Stipulation the Bank could send a thirty-day notice of default following which it could seek relief from the automatic stay under LBR 9071-1.³ After a hearing on December 7, 2000, the Debtor’s Chapter 13 Plan was confirmed by the Court on December 13, 2000 (the “Confirmation Order”) (Doc. No. 25).

On August 7, 2003, thirty-five months after the filing of the Stipulation, the Bank filed the Affidavit requesting relief from the automatic stay pursuant to the terms of the Stipulation and LBR 9071-1.⁴ In the Affidavit, the Bank alleged that the Debtor was in arrears for seven postpetition mortgage payments for January 1, 2003, through July 1, 2003, and seven late charges for a total arrearage in the amount of \$6,295.38. The Affidavit also recites that in accordance with the terms

² In this opinion, the words “Bankruptcy Code” or “Code” shall mean Title 11 of the United States Code.

³ LBR 9071-1 provides in part:

(a) *Conditional Terms.* A stipulation, judgment, or stipulated order filed and entered by the Court containing conditional terms, including automatic dismissal, conversion, or relief from stay, is not self-executing. The moving party must submit an affidavit stating that the conditions have or have not been met and a proposed order granting the appropriate relief to be entered by the Court two (2) business days after filing and mailing a copy of the same to all opposing parties.

⁴ Under the Stipulation relief by affidavit under LBR 9071-1 was available for the entire duration of the Debtor’s Chapter 13 proceeding. Subsequent to the approval of the Stipulation the Court began limiting the length of time that relief from the automatic stay was available under approved stipulations to a length of time considerably shorter than the duration of the entire case.

of the Stipulation a notice of default was sent to counsel for the Debtor on May 6, 2003 indicating that the Debtor was in arrears postpetition for five mortgage payments for January 1, 2003, through May 1, 2003, and four late charges for a total arrearage of \$4,462.11 and demanding payment on or before June 7, 2003 (the “Notice of Default”). A copy of the Notice of Default sent to the Debtor and his counsel was attached to the Affidavit as Exhibit A. Exhibit A to the Affidavit also included a copy of a letter to counsel for the Debtor from counsel for the Bank dated July 29, 2003. The letter contained a loan payment history and responded to an apparent question from the Debtor or his counsel about the posting of payments. The letter concluded by reciting that the arrearage was seven payments plus seven late fees totaling \$6,295.38, indicating that the Bank would be proceeding to file an affidavit of non-compliance with the Court and requesting payment of the arrearage by certified or bank check forthwith if the filing of an affidavit of non-compliance was to be avoided.

The Affidavit was filed on August 7, 2003, three months after the Notice of Default was mailed and nine days after the letter from the Bank’s counsel was sent to the Debtor’s counsel. Under LBR 9071-1 relief may be granted by the Court two business days after the filing of an affidavit of non-compliance unless the debtor files an objection and/or a counter-affidavit. On August 14, 2003, five business days after the filing of the Affidavit, the Court entered the Order granting relief from the automatic stay. On August 15, 2003, the Debtor filed an objection to the Affidavit (the “First Objection”) (Doc. No. 56) stating that all outstanding postpetition arrears had been paid and attaching a copy of a bank check dated August 14, 2003, payable to the Bank in the amount \$6,295.38. Because the Order had previously been entered and the time for objections to the Affidavit under LBR 9071-1 had expired, the First Objection was deemed untimely and moot.

On August 25, 2003, the Debtor filed the Motion seeking reconsideration of the Order. In the Motion, the Debtor alleged that payment in full of all arrears had been made on August 14, 2003, referred to the First Objection and indicated that despite attempts to contact the Bank's counsel to obtain consent to the Motion, he had been unable to speak with counsel. The Debtor also filed another objection to the Affidavit (the "Second Objection") (Doc. No. 58). In his Second Objection, the Debtor alleges that the Affidavit was filed nearly three years after it was approved by the Court, the Debtor is thirty-one months into his sixty-month Chapter 13 Plan and that it would be manifestly unjust to permit relief from the stay to foreclose on the Debtor's residence when he has cured all postpetition arrears and his reorganization is proceeding under the terms of his confirmed Chapter 13 Plan.

III. DISCUSSION

A "motion for reconsideration" is not recognized by the Federal Rules of Civil Procedure.⁵ In re Rodriguez, 233 B.R. 212, 218-19 (Bankr. D.P.R. 1999) (citations omitted). "The federal courts have consistently stated that a motion so denominated which challenges the prior judgment on the merits will be treated as either a motion 'to alter or amend' under Rule 59(e) or a motion for 'relief from judgment' under Rule 60(b)." Id. "Which rule applies depends essentially on the time a motion is served. If a motion is served within ten days after the entry of the order or judgement, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time, it falls under Rule 60(b)." Id.

⁵ The Federal Rules of Civil Procedure shall be referred to in this opinion as "Rule."

In this particular case, the Motion was filed twelve days after entry of the Order and one day after the ten-day time limit under Rule 59(e). See Fed. R. Bankr. P. 9006.⁶ Accordingly, the Court will treat the motion as one filed under Rule 60(b), as it has been made applicable to bankruptcy proceedings by FRBP 9024. To succeed on a Rule 60(b) motion, the Debtor must establish one or more of the six grounds listed in the rule. Construing the Motion and the Second Objection together as a request for relief from the Order, the Debtor is seeking relief under Rule 60(b)(5) on the grounds that it is no longer equitable for the Order to have prospective application because he has cured all arrears. Motions under Rule 60(b)(5) are committed to the sound discretion of the trial court. United States v. Kayser-Roth Corp., 272 F.3d 89, 100 (1st Cir. 2001).

Prior to the adoption of Rule 60(b)(5), the United States Supreme Court held that a party seeking to modify an injunction must offer proof of “hardship so extreme and unexpected as to justify . . . saying that they are the victims of oppression.” United States v. Swift, 286 U.S. 106, 119 (1932). The Supreme Court later disavowed any “talismanic quality” to the “grievous wrong” language in Swift and held that Rule 60(b) did not intend to apply the standard in Swift to all modifications of court decrees, but permitted a “less stringent, more flexible standard.” Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 380 (1992). The Rufo Court quoted with approval, the language in Swift which distinguished between a case “in which genuine changes” require modification of a court decree from a case in which the court decree gave “protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change.” Rufo, 502 U.S. at 379, quoting in part Swift, 286 U.S. at 114-15. Swift and Rufo represent opposite ends of a continuum along which any particular case must be located. Alexis Lichine & Cie. v.

⁶ The Federal Rules of Bankruptcy Procedure shall be referred to in this opinion as “FRBP.”

Sacha A. Lichine Estate Selections, Ltd., 45 F.3d 582, 586 (1st Cir. 1995). In considering the modification of a consensual resolution of a dispute between private parties represented by lawyers the court should:

look to such factors as the circumstances leading to the decree (including the nature of a party's initial wrongdoing), the quantum of hardship on the burdened party, the duration of the burden thus far and the prospect of its continuing, and the benefitted party's need for a continuation of the decree.

Id. "A party seeking modification of a consent decree may meet its initial burden by showing a significant change either in factual conditions or in law." Rufo, 502 U.S. at 384.

This case presents one of the fact patterns which has caused this Court to cease approving stipulations in Chapter 13 proceedings which provide for relief from the automatic stay by affidavit for the duration of the bankruptcy proceeding. Once a debtor has cured arrears existing at the time the stipulation is entered into and performs thereafter for a period of time which depends primarily upon the debtor's payment history, relief by affidavit under LBR 9071-1 should no longer be available. Approval of limited time periods for relief by affidavit protects the interests of creditors by not imposing the delay and expense involved in the serial filing of stay relief motions if a debtor is unable to provide the adequate protection ordered by the Court. The use of limited time periods for the availability of relief by affidavit under LBR 9071-1 also protects debtors who do cure arrears and provide adequate protection by requiring the creditor to file a new stay relief motion and come before the Court when a default occurs many months, or years, after the original arrearage has been cured.

However, that policy was not in effect when the Court approved the Stipulation. The Debtor has not alleged that he timely performed under the terms of the Stipulation, only that he eventually performed. The Debtor does not dispute any of the essential factual allegations in the

Affidavit. The Bank sent the Debtor a Notice of Default on May 6, 2003. At that time the Debtor was five months in arrears on the mortgage on his residence. Under the terms of paragraph 4 of the Stipulation the Debtor agreed to “continue making regular monthly mortgage payments each month within the applicable grace period.” Paragraph E of the Confirmation Order requires the Debtor to make regular monthly postpetition mortgage payments directly to the Bank outside of the Chapter 13 Plan.

Subsequent to the receipt of the Notice of Default it appears that the Debtor’s counsel was in contact with the Bank’s counsel regarding the posting of payments as mentioned in the letter from the Bank’s counsel to the Debtor’s counsel on July 29, 2003. Yet, as of the date of that letter, the Debtor had not cured the arrears stated in the Notice of Default and, apparently, had not made any other payments. Therefore, eighty-four days after the Notice of Default, the Debtor was seven months in arrears on his home mortgage. Finally, on August 7, 2003, ninety-three days after the date of the Notice of Default, the Bank filed the Affidavit. At no time during that ninety-three day time period did the Debtor seek any relief from this Court from the terms of the Stipulation.

LBR 9071-1 permits the Court to grant relief from the automatic stay two business days after a proper affidavit of non-compliance with an adequate protection order or stipulation is filed. In this case the Court did not actually enter the Order until five business days, or one full week, after the filing of the Affidavit. At no time prior to the entry of the Order did the Debtor file an objection or seek relief from the Court.

Both the Debtor and the Bank have a legitimate expectation that this Court will respect and enforce against all parties final orders on the payment of adequate protection, especially orders approving consensual agreements between the parties. Neither debtors nor creditors will have any incentive to resolve disputes over adequate protection by agreement unless the orders approving

such agreements are enforced by the Court. It would be contrary to the legitimate expectations of the parties for the Court to fail to enforce final orders dealing with adequate protection absent a compelling change in circumstances.

The Debtor could have sought modification of the Stipulation under Rule 60(b) if he could establish that there had been a material change in the circumstances since the original approval of the Stipulation. In the nearly three years since the Stipulation was approved there may have been material changes in the circumstances of this case (i.e., temporary job loss, disabling injury, substantial increase in equity in the collateral) which would make the literal enforcement of the Stipulation inequitable. However, no such changes were brought to the Court's attention prior to the entry of the Order. In the Motion, the Debtor does not allege any change in factual conditions or law which would justify a modification of the terms of the Stipulation. See Rufo, 502 U.S. at 384. Therefore the Debtor has not shown that he can meet the initial burden required to result in a change in the terms of the Order.

The Court agrees with the Debtor that a foreclosure on the Debtor's home under the circumstances of this case may be a harsh result. It certainly would be unfortunate when the Debtor is more than half way through his Chapter 13 Plan. However, the Court notes that the granting of stay relief by this Court does not leave the Debtor without recourse to the state superior court for injunctive relief to prevent foreclosure or for post-foreclosure remedies.

IV. CONCLUSION

For the reasons set forth above, the record in this case does not demonstrate that enforcement of the Stipulation and entry of the Order is inequitable. Accordingly, the Motion shall

be denied by separate order. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: August 28, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge